transaction, by force of the contract clause of the Constitution.[21] Yet only those rights conferred by a state at the time of contracting are preserved, and these are no broader than the state has conceded.[22] Here the paramount authority had given the creditor the undoubted, but not unrestricted, right to have the county circuit court enforce its order "by mandamus or otherwise." This is construed as conceding power only to order the proper officials to levy taxes,[23] and it might also be construed as giving consent to be proceeded against solely in the county court. Although where statute gives "a court" authority to collect a tax, federal courts have not hesitated to act,[24] nevertheless, a clearly expressed restriction confining the remedy against the sovereign to a state court might furnish another insuperable obstacle to federal jurisdiction in a case like the one in question.[25]

THE RELATIONAL DUTY OF THE PUBLIC SERVICE COMPANY TO ITS PUBLIC. — In a recent New York decision, recovery was refused a traveller on a railroad because there was no contract of carriage upon which to base a suit. *Robinson* v. *New York, N. H. & H. R. Co.*, 150 N. Y. Supp. 925 (App. Div.).[1] The decision raises the question of whether the obligation of the public service company to its public is based on contract or on a relation between the parties because of which the law imposes certain duties upon them. Sir Henry Maine in the middle of the last century wrote that the society of his day was chiefly to be distinguished from that of the previous generation by the largeness of the sphere occupied in it by the law of contract as opposed to that of status.[2] But Professor Pound has shown that the law of to-day is abandoning this nineteenth-century idea of the supremacy of contract and is, instead, further developing the older conception which goes back for its source to the Year Books.[3] In no field of the law has there been more striking

[21] THE CONSTITUTION, Art. I, sec. 10, cl. 1. Von Hoffman *v.* City of Quincy, *supra*. See Bronson *v.* Kinzie, 1 How. (U. S.) 311, 317; Edwards *v.* Kearzey, 96 U. S. 595, 607; Louisiana *v.* New Orleans, 102 U. S. 203, 206; Mobile *v.* Watson, 116 U. S. 289; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 414–5.

[22] See n. 20, *supra*.

[23] The statute in question was originally passed in 1879, and came before the Supreme Court in Seibert *v.* Lewis, 122 U. S. 284, 291, 298. See cases *supra*, n. 20.

[24] See Supervisors *v.* Rogers, *supra;* Stansell *v.* Levee Board of Mississippi, Dist. No. 1, 13 Fed. 846; Campbellsville Lumber Co. *v.* Hubbert, 112 Fed. 718, 721.

[25] In the principal case, however, mandamus seems to have issued from the federal district court prior to the present suit.

[1] For a statement of the case, see RECENT CASES, p. 626.

[2] MAINE, ANCIENT LAW, 4 ed., ch. 9.

[3] POUND, A FEUDAL PRINCIPLE IN MODERN LAW, 25 INTERN. J. OF ETHICS, No. 1. "The Roman idea of a legal transaction which the nineteenth century sought to apply to all possible situations, was regarded as the legal institution of the maturity of law. But the conception of a legal transaction regards individuals only. In the pioneer agricultural societies of nineteenth century America such a conception sufficed. In the industrial and urban society of to-day, classes and groups and relations must be taken account of no less than individuals. Happily the nineteenth century did not lose for us the contribution of the feudal law to our legal tradition. In its idea of relation, in the characteristic common law mode of treating legal problems which it derived from the analogy of the incidents of feudal tenure we have a legal institution of capital importance."

evidence of this swing from the contractual back to the relational than in that of public service. A legion of cases reported in the century before Elizabeth show how clearly the courts then based their recovery on the character of the profession of the public servant rather than on his agreement.[4] But in the centuries that followed, the law of public callings almost disappeared except that of innkeepers and carriers, which continued within fixed rules, and when in the nineteenth century its great modern development began, the earlier principles were largely forgotten and the law was often phrased solely in terms of what the parties had agreed to do.[5] At the present time the courts are unwilling to confine this branch of the law within the bounds of contract, so that while decisions still often sound in its phrases, — the results themselves are inconsistent with that explanation.[6]

No matter what language the courts may use, it seems clear on a survey of the law, that the great body of rules governing public callings are not based upon contract. Obligations are imposed upon those engaged in such pursuits by numerous statutes, as for example the laws passed by Congress regulating interstate commerce,[7] — obligations which must be fulfilled regardless of the will of the parties in entering the relation. Although in construing one of these statutes, the Supreme Court was at first able to say that its provisions were "implied" terms of the contract,[8] when confronted with a case in which no contract could be worked out, they rested their decision squarely on the ground of a relational duty irrespective of agreement.[9] At common law, without the aid of statutes, the courts enforce liability in the very face of attempted contracts such as ones limiting liability of a carrier for negligence of its servants.[10] Private persons could make such contracts, but the status of a public servant fixes his duties and imposes this disability. It is the veriest truism that a public servant is bound to serve all who apply, at reasonable rates, providing them with adequate facilities, and to do all this without discrimination. Even if agreements are made in accordance

[4] Anon., Keilw. 50, pl. 4. "Note that it was agreed by all the court that where a smith declines to shoe my horse, or an innkeeper refuses to give me entertainment at his inn, I shall have an action on the case, notwithstanding no act is done; for it does not depend upon agreement." Numerous other cases showing the way the early law regarded public callings have been translated in WYMAN, PUBLIC SERVICE CORPORATIONS, ch. 1. Of these see especially Y. B. 22 Edw. IV. 49, pl. 15; Y. B. 19 Hen. VI. 49, pl. 5; Y. B. 39 Hen. VI. 18, pl. 24.

[5] This view was never more concisely expressed than in Pounder *v.* Northeastern Ry., [1892] 1 Q. B. 385, when Smith, J., asked, "What is the duty of a railway to its passengers?" and answered, "It arises out of the contract. . . ."

[6] "The carrier's contract is to protect the passenger against all the world." Craher *v.* Chicago & N. W. Ry., 36 Wis. 657, 673. There is of course no such term in the actual contract between the parties. This is part of the duty which the law imposes on the carrier.

[7] *E. g.*, the HEPBURN ACT, June 29, 1906, c. 3591, 34 STAT. 584.

[8] Kansas, etc. Ry. Co. *v.* Carl, 227 U. S. 639, more particularly at 650; see also Missouri, etc. Ry. *v.* Harriman, 227 U. S. 657.

[9] Boston, etc. Ry. *v.* Hooker, 233 U. S. 97. The language in the majority decision on the subject of duties imposed by the statute is excellent. The correctness of the result, however, in applying the general principles to the facts of the particular case was criticised in 27 HARV. L. REV. 737.

[10] New York Central R. *v.* Lockwood, 17 Wall. (U. S.) 357. The cases to the contrary are influenced by the ordinary doctrines as to contracts. See Mynard *v.* Syracuse, B. & N. Y. R., 71 N. Y. 180.

with these enforced duties and without attempt at contractual evasion, the obligations are thus imposed by law from the relation of patron and public utility and do not arise from the will and intent of the parties. It becomes apparent that contract can exist in this part of the law only so far as it does not conflict with the paramount duty of the public servant to the public.[11]

In view of these principles, the present case sounds the note of mid-Victorian individualism in its most objectionable form. A traveller surrendered her ticket to the conductor of the first of two railroads over which she was making a through trip and neglected to receive a voucher in return. The ticket, which was offered *bonâ fide* and accepted without objection, was not in fact good. Recovery for physical suffering caused by insults from the conductor of the defendant second railroad was refused on the ground that there was no contract on which to base an action. It may be admitted that the defendant's conductor could have ejected the plaintiff upon her inability to produce a voucher if she refused to pay her fare.[12] But permitting her to remain and then insulting her is indefensible, for she had the same right to be protected from the insults of the defendant's servants as any other person rightfully on the train.[13] To place the victim of a mistake in the position of a trespasser is indeed an unfortunate result, and shows in what a position the law finds itself when it abandons the conception of status and adopts that of contract.

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[11] Three recent cases show various methods of approach to this problem. In Middleton *v.* Whitridge, 52 N. Y. L. J. 1621 (N. Y. Ct. of App.), the court held that there was an added duty imposed on a carrier to care for a passenger who became sick on the journey. It was said that "that duty springs from the contract to carry safely" but that "of course the carrier is not bound" without notice. Such a distinction shows that the "contract" the court is talking about is only the duty imposed by the law. The Supreme Court of Arkansas in an analogous case, Weirling *v.* St. Louis, I. N. & S. R., 171 S. W. 901, laid no emphasis on the contract of carriage, but the duty of the carrier is put rather on relational grounds. And in Gilkerson *v.* Atlantic Coast Linc R. Co., 83 S. E. 592 (S. C.) it was held that there was a duty upon a carrier to wake a passenger in order to allow him to alight at his destination when the conductor had agreed to do this.

[12] See Delaware, L. & W. Ry. *v.* Bullock, 60 N. J. L. 24, 36 Atl. 773, "The right of the company was to refuse to carry him under existing conditions."

[13] See Delaware, L. & W. R. *v.* Trautwein, 52 N. J. L. 169, 19 Atl. 178, "The duty of persons engaged in these public employments to safely and securely carry is independent of contract. It is a duty imposed by law from considerations of public policy, and arises from the fact that persons or property are received in the course of the business of such employments." And see Marshall *v.* York, N. & B. Ry., 11 C. B. 655; Carroll *v.* Staten Island R., 58 N. Y. 126. The person injured need not be a "passenger" in order to recover. Bradford *v.* Boston & Maine R., 160 Mass. 392, 35 N. E. 1131. It is enough to make the carrier liable that the person injured was rightfully there. See Hale *v.* Grand Trunk Ry., 60 Vt. 605, 15 Atl. 300; Philadelphia & Reading R. *v.* Derby, 14 How. (U. S.) 468. It is a general rule of railroads that persons need not purchase tickets until after they get on the train, and yet they have all the rights of passengers before fare is collected.